

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

IN THE MATTER OF:)	DIVISION OF WATER
)	POLLUTION CONTROL
J.J. DETWEILER ENTERPRISES,)	
INC. AND HORST BROTHERS)	
CONSTRUCTION, LLC.)	CASE NO. 06-0231
)	
RESPONDENTS)	
)	

COMMISSIONER'S ORDER AND ASSESSMENT

NOW COMES James H. Fyke, Commissioner of the Tennessee Department of Environment and Conservation, and states:

PARTIES

I.

James H. Fyke is the duly appointed Commissioner of the Tennessee Department of Environment and Conservation (hereinafter the "Department").

II.

J.J. Detweiler, Inc. is a foreign corporation created in the State of Ohio and properly registered in the State of Tennessee. J.J. Detweiler Enterprises, Inc. (hereinafter the "Respondent Detweiler") is developing the subdivision known as Wilder Mountain, which is located off of Highway 85 in Fentress County, Tennessee. Service of process may be made on Respondent Detweiler's registered agent, C. T. Corporation System, at 800 South Gay Street, Suite 2021, Knoxville, Tennessee 37929.

III.

Horst Brothers Construction, LLC ("Respondent Horst"), is the contractor listed on the National Pollutant Discharge Elimination System General Permit for Construction Storm Water ("TNCGP") for the Wilder Mountain subdivision and is listed as an active limited liability company licensed to do business in the State of Tennessee. Service of process may be made on Mr. Paul A. Horst, 6835 South York Highway, Clarkrange, Tennessee 38553.

JURISDICTION

IV.

Whenever the Commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) §69-3-101 *et seq.*, the *Water Quality Control Act*, (hereinafter the "Act") has occurred, or is about to occur, the Commissioner may issue a complaint to the violator and may order that corrective action be taken, pursuant to T.C.A. §69-3-109(a) of the Act. Further, the Commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. §69-3-115 of the Act and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. §69-3-116 of the Act. Department rules governing general water quality criteria and use classifications for surface waters have been promulgated, pursuant to T.C.A. §69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (hereinafter the "Rule").

V.

The Respondents are "persons" as defined at T.C.A. §69-3-103(20) and, as herein described, have violated the Act.

VI.

The East Fork of the Obey River, Snap Branch, Sandy Branch, Deep Branch, Panther Branch, their unnamed tributaries, and all wetlands and streams identified in the Respondents' wetland and stream delineation reports are "waters of the state", as defined by T.C.A. §69-3-103(33).

VII.

T. C. A. § 69-3-108 requires a person to obtain a permit from the Department prior to the alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state. Pursuant to T.C.A. § 69-3-108, Rule 1200-4-7-.04 requires a person to submit an application prior to engaging in any activity that requires an Aquatic Resource Alteration Permit that is not governed by a general permit or a § 401 Water Quality Certification. No activity may be authorized unless any lost resource value associated with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource value.

VIII.

T.C.A. §69-3-108 requires that a person obtain coverage under a permit prior to discharging any substance into waters of the state, or to a location from which it is likely

that the discharged substance will move into waters of the state. Coverage under the general permit for Storm Water Discharges Associated With Construction Activity may be obtained by submittal of a Notice of Intent ("NOI").

FACTS

IX.

On August 17, 2005, the Cookeville Environmental Field Office ("C-EFO") received a citizen complaint that dirt and brush were being pushed into a creek at a new subdivision that was being built in Fentress County Tennessee. On August 26, 2005, Tennessee Division of Water Pollution Control ("Division") personnel conducted an investigation in response to the complaint and found that a 3500-acre subdivision was being developed by the Respondents ("site").

At the beginning of the investigation, Division personnel asked to see the Respondents' Notice of Coverage ("NOC") under the TNCGP and the Storm Water Pollution Prevention Plan ("SWPPP") for the site. The Respondents could not produce these documents for review by the Division. A later check of the records at the C-EFO revealed that the Respondents had not submitted a Notice of Intent ("NOI") to be covered under the TNCGP prior to commencing work at the site.

During the inspection, Division personnel noted that many acres at the site had been cleared for roads without the implementation or maintenance of erosion prevention and sediment control measures ("EPSCs") and without obtaining coverage under the TNCGP. Additionally, the Division learned that construction had been ongoing at the site since May 2005.

The Division also observed that the Respondents had conducted road-construction activity, including clearing and excavation activities, in a wetland, identified later by the Respondents' consultant as wetland #10. The Respondents had not gained coverage under an Aquatic Resources Alteration Permit ("ARAP") before engaging in this activity as required. The Division observed that the Respondents' road construction activities had caused a physical alteration of waters of the state as well a discharge of sediment and rock into the above referenced wetland.

Later that day, the Respondents submitted a NOI for coverage under the TNCGP to the C-EFO for the Wilder Mountain subdivision Phases I-VI.

X.

The Division issued a Notice of Violation ("NOV") to Respondent Detweiler on September 2, 2005. Respondent Detweiler received the NOV on September 13, 2005, as evidenced by the return receipt. The Division issued a NOV to Respondent Horst on September 6, 2005. Respondent Horst received the NOV on September 8, 2005, as evidenced by the return receipt. The NOVs informed the Respondents of the violations found during the August 26, 2005, inspection, requested that the Respondents comply with the requirements of the TNCGP, and informed the Respondents that an enforcement action may ensue for the violations discovered during the inspection.

XI.

On September 7, 2005, Division personnel conducted a follow-up inspection at the site. The Division observed that the Respondents had continued construction activities at the site without authorization under a TNCGP. Although an NOI had been

delivered to the C-EFO on August 26, 2005, it was found to be deficient, and a NOC under the TNCGP had not yet been issued.

During the inspection, the Division also observed that the Respondents had engaged in road construction activities in wetlands and a stream, identified later by the Respondents' consultant as wetlands 1, 1B, 3, 4, 5, 6, 7 and Stream C, without obtaining authorization for such work under an ARAP permit as required. The Division noted that the Respondents' unpermitted road construction activities had caused a physical alteration of waters of the state and a discharge of sediment at the above referenced streams and wetlands as well as one other wetland, which would be identified later as wetland 10.

XII.

In response to the violations found during the September 7, 2005, inspection, the Division issued the Respondents NOVs on September 12, 2005. Respondent Horst received the NOV on September 14, 2005, as evidenced by the return receipt. Respondent Detweiler received the NOV on September 22, 2005, as evidenced by the return receipt. The NOVs informed the Respondents of the violations found during the September 7, 2005, investigation. The NOV requested that the Respondents apply for ARAP permits prior to work proceeding for any additional impacts to streams and wetlands.

The NOV also required the Respondents to do the following within thirty (30) days: (1) conduct a wetlands delineation to determine the size of all wetlands that have been impacted at the site; (2) submit the results to the Division; and (3) submit a corrective action plan ("CAP") detailing how the impacted wetlands will be restored or

mitigated. The NOV also warned the Respondents that appropriate permits must be obtained before work resumed at the site.

XIII.

On September 19, 2005, the Division issued Respondent Detweiler a letter summarizing the deficiencies in the Respondent's NOI for coverage under the TNCGP. The deficiencies included an inadequate Storm Water Pollution Prevention Plan (SWPPP) and an NOI, which incorrectly indicated that there were no wetlands present on the site.

XIV.

On September 22, 2005, the Division received from the Respondents a response to the September 12, 2005, NOV. The letter included a schedule of compliance depicting the dates for conducting a wetlands delineation and subsequently providing the Division with a CAP. The letter stated that the Respondents had implemented and maintained EPSCs and that an ARAP application would be applied for should any further alterations become necessary to wetlands or streams on-site.

XV.

The Division issued a NOC under the TNCGP to the Respondents on October 25, 2005. In the cover letter, which accompanied the NOC, the Division stated that it was

issuing the NOC because the Respondents had submitted a revised NOI and SWPPP on October 20, 2005.

XVI.

On October 25, 2005, the Respondents submitted an application for coverage under the *General Permit for Construction and Removal of Minor Road Crossings* ("General ARAP") for ten (10) road crossings at the site along a road that runs adjacent to the East Fork of the Obey River.

XVII.

On October 31, 2005, the Division sent Respondent Detweiler a letter granting coverage under the General ARAP for ten (10) road crossings. In this letter, the Division informed the Respondents that work must be accomplished in conformance with information submitted with the application and with the conditions set forth in the General ARAP, a copy of which was enclosed. Finally, the Division stated in this letter that the proposed work might also require authorization from the U.S. Army Corps of Engineers ("USACOE"). Respondent Detweiler received this letter on November 2, 2005, as evidenced by the return receipt requested.

XVIII.

On November 9, 2005, the Division received from the Respondents a jurisdictional wetlands delineation report prepared by Tetra Tech EM, Inc ("Tetra Tech").

The report identified and delineated the following wetlands: 1, 1B, 2, 3, 4, 5, 6, 7, 8, 9, and 9B. The report identified wetlands 1, 1B, 3, 4, 7, and 9 as having been temporarily and/or permanently impacted as a result of the Respondents' road construction activities. The report suggested mitigation for the permanently filled areas, manual removal of sediment in a few areas, time and natural re-vegetation for the remaining impacted areas, and implementation of EPSCs along the borders to keep any more sediment from entering the wetland areas. Stream impacts were not addressed in this report.

XIX.

Division personnel, USACOE personnel and a Tetra Tech ecologist conducted a Wilder Mountain site visit on December 8, 2005, to review the total wetland areas impacted by the Respondents' road construction activities in the wetlands delineation report submitted by Tetra Tech on November 9, 2005. It was determined that another wetland, identified as wetland 10, had been impacted and that various stream areas had been impacted as well, which were not listed in Tetra Tech's report.

Division personnel observed that the Respondents had engaged in road construction activity in wetlands 2 and 8 without obtaining coverage under an ARAP as required. Division personnel also noted a physical alteration of waters of the state and discharge of sediment in wetlands 2, 3, 4, 5, 6, 7, 8, and 10.

While on this site visit, Division personnel also observed the following violations of the Respondents' TNCGP permit:

- EPSCs not selected, installed, and maintained properly

- Sediment not removed from behind silt fencing and other sediment traps after reaching 50% design capacity
- Off-site accumulations of sediment not removed at frequency to prevent off-site impacts
- EPSC measures not in place prior to earth moving activity beginning
- Road construction occurring in areas not depicted in SWPPP

After this site visit, Division personnel discussed with the Respondents the violations discovered and the need to correct these violations.

XX.

On or about January 11, 2006, the Division received a copy of the final wetlands delineation report prepared by Tetra Tech.

XXI.

On January 26, 2006, the Division issued a letter to the Respondents granting a time extension request on the submittal of the CAP. The Division also requested a stream delineation report as part of the CAP.

XXII.

On February 2, 2006, Division, USACOE, and Tennessee Wildlife Resources Agency (TWRA) personnel conducted an inspection at the site with representatives of the Respondents. The Division started the site visit along the road running adjacent to the East Fork of the Obey River. The Division noted that the Respondents were violating numerous conditions of their General ARAP at the following road crossings:

Road Crossing #10 over Snap Branch (ARAP # 0507.190)

- EPCS measures not adequately selected, implemented and/or maintained
- Insufficiently sized rock placed directly into stream channel

Road Crossing #9 over Sandy Branch (ARAP #0507.189)

- Two culverts installed but only one culvert was authorized under the permit
- EPSC measures not adequately selected, implemented and/or maintained
- Insufficiently sized rock placed directly into stream channel

As a result of these violations, physical alteration of waters of the state and sedimentation had occurred at each of the above referenced road crossings.

The Division was unable to inspect the other road crossings located further down the road. The Respondents told Division personnel that they could not access the remainder of the road in their vehicles because it was only one lane wide and a multi-drive dump truck was operating on the road that day.

The Division next inspected the plateau area of the site. The Division observed that the Respondent had commenced road construction activity in wetland 9 without obtaining an ARAP permit as required. The Division also noted that the Respondents' road construction activities had caused a physical alteration of waters of the state and sedimentation to occur in wetlands 3, 4, 6, 7, 8, 9, and 10.

During the course of the inspection, the Division observed that the Respondents had violated numerous provisions of the TNCGP including the following:

- EPSCs not selected, installed, and maintained properly
- Sediment not removed from behind silt fencing and other sediment traps after reaching 50% design capacity
- Off-site accumulations of sediment not removed at frequency to prevent off-site impacts
- EPSC measures were not in place prior to earth moving activity beginning
- Road construction in areas not depicted in SWPPP
- Sediment basins depicted in SWPPP not constructed

XXIII.

On March 14, 2006, personnel from the Division, USACOE, TWRA and the Respondents inspected the site. The Division observed the following violations of the Respondents TNCGP:

- EPSCs not selected, installed, and maintained properly
- Sediment not removed from behind silt fencing after reaching 50% design capacity
- Off-site accumulations of sediment not removed at frequency to prevent off-site impacts
- EPSC measures were not in place prior to earth moving activity beginning
- Road construction in areas not depicted in SWPPP
- Sediment basins depicted in SWPPP not constructed

Division personnel observed that the Respondents had continued to violate the requirements of the General ARAP at the following road crossings:

Road Crossing #10 over Snap Branch (ARAP # 0507.190)

- EPSC measures not adequately selected, implemented and/or maintained
- Insufficiently sized rock placed directly into stream channel

Road Crossing #9 over Sandy Branch (ARAP #0507.189)

- EPSC measures not adequately selected, implemented and/or maintained
- Insufficiently sized rock placed directly into stream channel

Road Crossing #6 (ARAP #0507.186) Unnamed Tributary East Fork of Obey

- Excavation and fill activities associated with road crossing not kept to a minimum
- EPSC measures not adequately selected, implemented and/or maintained
- Clearing and grubbing of riparian vegetation not kept to a minimum
- Insufficiently sized rock placed directly into stream channel

While proceeding to Road Crossing #5, the Division observed that a cut had been made into the side of the mountain for purposes of constructing the road. The cut area remained unstable and the fill and rock from the cut had been deposited on the side of the road near Deep Branch. The Respondents then allowed this unstable rock and fill to slide down into Deep Branch.

Road Crossing #5 over Deep Branch (ARAP #0507.185)

- Excavation and fill activities associated with road crossing not kept to a minimum
- EPSC measures not adequately selected, implemented and/or maintained
- Insufficiently sized rock placed directly into stream channel

Road Crossing #4 over unnamed Tributary of Deep Branch (ARAP 0507.184)

- Excavation and fill activities associated with road crossing not kept to a minimum
- EPSC measures not adequately selected, implemented and/or maintained
- Insufficiently sized rock placed directly into stream channel
- Silt fencing had also been improperly placed directly in the stream channel.
- Clearing, grubbing and other disturbance to riparian vegetation not kept to a minimum.

As a result of these violations, the Division noted that physical alteration of waters of the state and sedimentation had occurred at each of the above referenced road crossings.

The Division was unable to inspect the additional road crossings permitted under the General ARAP at this site. The road had become impassible at this point due to poor road conditions and equipment located in the roadway.

The Division next inspected the area of the site that was located on top of a plateau. Respondents had constructed road crossings over Stream E, Stream F, Stream G, and Stream K without obtaining an ARAP permit as required. The Division also observed that the Respondents had constructed a road through wetland 11 without obtaining an ARAP permit as required. Finally, Division personnel noticed that the

Respondents' actions had caused a physical alteration of waters of the state and sedimentation to occur in Streams E, F, G, K and wetlands 2, 3, 4, 5, 6, 8, 9, 10, and 11.

XXIV.

The Division received a wetland and stream mitigation proposal on March 23, 2006. This proposal stated that the Respondents would purchase mitigation credits to offset the permanent wetland and stream impacts incurred by road construction at the site and remove sediment from some of the temporarily impacted wetlands and streams.

XXV.

On April 7, 2006, the Division sent the Respondents a letter notifying them that the Division had approved the restoration and mitigation plan subject to certain conditions described in the letter.

XXVI.

The Division conducted a follow up inspection on April 14, 2006. The Division started the inspection along the road adjacent to the East Fork of the Obey River. Division personnel again observed violations of the Respondents General ARAP at the following road crossings:

Road Crossing #10 over Snap Branch (ARAP # 0507.190)

- EPSC measures not adequately selected, implemented and/or maintained
- Insufficiently sized rock placed directly into stream channel

Road Crossing #9 over Sandy Branch (ARAP #0507.189)

- EPSC measures not adequately selected, implemented and/or maintained

- Insufficiently sized rock placed directly into stream channel

While proceeding to Road Crossing #5, the Division again observed the slide area noted on the previous site visits. In an attempt to stabilize the slide, the Respondents had placed large boulders directly below the slide area and directly into Deep Branch without obtaining approval for this action under an individual ARAP permit as required. The slide area remained unstable, and as a result, sediment continued to be discharged into Deep Branch.

Road Crossing #5 over Deep Branch (ARAP #0507.185)

- Excavation and fill activities associated with road crossing not kept to a minimum
- EPSC measures not adequately selected, implemented and/or maintained
- Insufficiently sized rock placed directly into stream channel

Road Crossing #4 over unnamed Tributary of Deep Branch (ARAP 0507.184)

- Excavation and fill activities associated with road crossing not kept to a minimum
- EPSC measures not adequately selected, implemented and/or maintained
- Insufficiently sized rock placed directly into stream channel
- Silt fencing placed directly in stream channel
- Clearing, grubbing and other disturbance to riparian vegetation not kept to a minimum

As a result of these violations, physical alteration of waters of the state and sedimentation had occurred in the streams at each of the above referenced road crossings.

During this inspection, the Division also observed the following violations of the Respondents TNCGP:

- EPSCs not selected, installed, and maintained properly
- Sediment not removed from behind silt fencing after reaching 50% design capacity

- Off-site accumulations of sediment not removed at frequency to prevent off-site impacts
- EPSCs not in place prior to earth moving activity beginning
- Sediment basins depicted in SWPPP not constructed as depicted

XXVII.

The Division conducted a follow up inspection on May 16, 2006. Division personnel again observed violations of the Respondents' General ARAP at several road crossings.

Road Crossing #10 over Snap Branch (ARAP # 0507.190)

- EPSC measures not adequately selected, implemented and/or maintained
- Insufficiently sized rock placed directly into stream channel

Road Crossing #9 over Sandy Branch (ARAP #0507.189)

- EPSC measures not been properly implemented and/or maintained
- Insufficiently sized rock placed directly into stream channel
- Bottom of culverts not constructed below stream bed level in a manner to allow natural substrate to reestablish

On the way to the next road crossing, the Division observed that the Respondents had installed a road crossing over a groundwater seepage, which was determined by the Division to be a waters of the state. The Respondents had installed this road crossing without obtaining as ARAP permit as required.

Road Crossing #6 over Unnamed Tributary to East Fork of Obey River (ARAP #0507.186)

- Culvert had not been installed in proper alignment with the stream and as a result, flow was not being captured through the culvert

- EPSC measures had not been properly implemented or maintained
- Insufficiently sized rock had been placed directly into stream channel
- Excavation and fill activities associated with road crossing not kept to a minimum

Division personnel again observed the slide area, noted during the previous inspections, while on the way to inspect Road Crossing #5. Large boulders remained lodged in the Deep Branch. Erosion control matting had been installed over the slide area to attempt to stabilize it. However, the Division observed that stabilization had not been achieved and sediment continued to be discharged into Deep Branch from the slide area.

Road Crossing #5 over Deep Branch (ARAP 0507.185)

- Excavation and fill activities associated with road crossing not kept to a minimum
- EPSC measures not properly implemented or maintained
- Insufficiently sized rock had been placed directly in stream channel

Road Crossing #4 over unnamed Tributary of Deep Branch (ARAP 0507.184)

- Excavation and fill activities associated with road crossing not kept to a minimum
- EPSC measures not adequately selected, implemented and/or maintained
- Insufficiently sized rock placed directly into stream channel
- Silt fencing placed directly in stream channel
- Clearing, grubbing and other disturbance to riparian vegetation not kept to a minimum

As a result of these violations, physical alteration of waters of the state and sedimentation had occurred in the streams at each of the above referenced road crossings.

The Division next proceeded to the plateau area of the site. The Division noted that the road leading to the site was not identified in the Respondents' SWPPP and that this is a violation of the TNCGP. Upon arriving on the plateau, the Division observed that physical alteration of waters of the state and sedimentation had occurred in wetlands

1, 1B, 10, and 11. Additionally, the Division observed the following violations of the Respondents' TNCGP:

- EPSCs not selected, installed, and maintained properly
- Sediment not removed from behind silt fencing after reaching 50% design capacity
- Off-site accumulations of sediment not removed at frequency to prevent off-site impacts
- EPSC measures were not in place prior to earth moving activity beginning
- Sediment basins depicted in SWPPP not constructed as depicted
- Road installed that was not depicted on SWPPP

XXVIII.

Division personnel inspected the site again on May 22, 2006. Division personnel started the inspection along the roadway adjacent to the East Fork of the Obey River.

Division personnel observed violations of the General ARAP at the following road crossings:

Road Crossing #10 over Snap Branch (ARAP # 0507.190)

- EPSC measures not implemented and maintained
- Insufficiently sized rock placed directly in stream

Road Crossing #9 over Sandy Branch (ARAP #0507.189)

- EPSC measures not been properly implemented and/or maintained
- Insufficiently sized rock placed directly into stream channel
- Bottom of culverts not constructed below stream bed level in a manner to allow natural substrate to reestablish
- Installation of culverts permanently disrupts movement of fish and aquatic life

The Division next observed the unpermitted road crossing that had been identified during the last site visit located near ARAP #7. Sediment continued to be discharged into

waters of the state at this location. Upon viewing this, Division personnel proceeded to view the next road crossing.

Road Crossing #6 over Unnamed Tributary to East Fork of Obey River (ARAP #0507.186)

- Culvert had not been installed in proper alignment with the stream and as a result, flow was not being captured through the culvert
- EPSC measures had not been properly implemented or maintained.
- Insufficiently sized rock had been placed directly into stream channel
- Excavation and fill activities associated with road crossing not kept to a minimum

On the way to the next road crossing, the Division observed two additional unpermitted road crossings. The first unpermitted road crossing was a ground water seepage, while the second unpermitted road crossing was over a spring. Both the groundwater seepage and spring were determined by the Division to be waters of the state. Therefore, ARAP permits should have been applied for before these two road crossings were installed. As a result of this unpermitted activity, physical alteration of waters of the state and sedimentation had occurred at these two locations.

Road Crossing #5 over Deep Branch (ARAP 0507.185)

- Excavation and fill activities associated with road crossing not kept to a minimum
- EPSC measures not properly implemented or maintained
- Insufficiently sized rock had been placed directly in stream channel

Road Crossing #4 over unnamed Tributary of Deep Branch (ARAP 0507.184)

- Excavation and fill activities associated with road crossing not kept to a minimum
- EPSC measures not adequately selected, implemented and/or maintained

- Insufficiently sized rock placed directly into stream channel
- Silt fencing placed directly in stream channel
- Clearing, grubbing and other disturbance to riparian vegetation not kept to a minimum

Road Crossing #2 (ARAP 0507.182)

- EPSC measures not adequately selected, implemented and/or maintained
- Insufficiently sized rock placed directly into stream channel

As a result of these violations, physical alteration of waters of the state and sedimentation had occurred in the streams at each of the above referenced road crossings.

During this site visit, the Division also observed the following violations of the

Respondents' TNCGP:

- EPSCs not selected, installed, and maintained properly
- Sediment not removed from behind silt fencing after reaching 50% design capacity
- Off-site accumulations of sediment not removed at frequency to prevent off-site impacts
- EPSC measures not in place prior to earth moving activity beginning
- Sediment basins depicted in SWPPP not constructed
- Road installed that was not depicted on SWPPP

XXIX.

During the course of investigating this matter the Division incurred damages in the amount of THREE THOUSAND ONE HUNDRED AND EIGHTY DOLLARS AND THIRTY-SEVEN CENTS (\$3,180.37).

VIOLATIONS

XXX.

In failing to install and maintain adequate sediment and erosion control measures to control storm water runoff as required by the TNCGP, as described herein, the Respondents have violated T.C.A. §69-3-108(b) and §69-3-114(b):

T.C.A. §69-3-108(b) states:

It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

- (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state;
- (6) The discharge of sewage, industrial wastes, or other wastes into water, or a location from which it is likely that the discharged substances will move into waters;

T.C.A. §69-3-114(b) states:

- (b) In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in §69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

XXXI.

By conducting activities without the necessary permits as described herein, the Respondents have violated T.C.A. § 69-3-108(a).

T.C.A. § 69-3-108(a) states:

- (a) Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (j), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.

XXXII.

In causing pollution to waters of the state, as described herein, the Respondents have violated T.C.A. § 69-3-114(a):

T.C.A. §69-3-114(a) states:

- (a) It shall be unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in §69-3-103(22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

T.C.A. §69-3-103(22) provides:

(22) "Pollution" means such alteration of the physical, chemical, biological, bacteriological, or radiological properties of the waters of this state including but not limited to changes in temperature, taste, color, turbidity, or odor of the waters:

- (A) As will result or will likely result in harm, potential harm or detriment of the public health, safety, or welfare;
- (B) As will result or will likely result in harm, potential harm or detriment of the health of animals, birds, fish or aquatic life;
- (C) As will render or will likely render the waters substantially less useful for domestic, municipal, industrial, recreational, or other reasonable uses; or
- (D) As will leave or will likely leave the waters in such condition as to violate any standards of water quality established by the board.


ORDER AND ASSESSMENT

XXXIII.

WHEREFORE, pursuant to the authority vested by T.C.A. §§69-3-109, 69-3-115 and 69-3-116, I, James H. Fyke, hereby issue the following ORDER and ASSESSMENT to the Respondents:

1. The Respondents shall pay a total CIVIL PENALTY in the amount of ONE HUNDRED THIRTEEN THOUSAND THREE HUNDRED AND SEVENTY-FIVE DOLLARS (\$113,375.00) within thirty (30) days of receipt of this ORDER AND ASSESSMENT.
2. The Respondents shall pay DAMAGES of THREE THOUSAND ONE HUNDRED AND EIGHTY DOLLARS AND THIRTY-SEVEN CENTS (\$3,180.37) to the Department within thirty (30) days of receipt of this Order.
3. The Respondents shall otherwise conduct their businesses in accordance with the Act and Rules promulgated pursuant to the Act.
4. Further, the Respondents are advised that this ORDER and ASSESSMENT is in no way to be construed as a waiver, expressed or implied, of any provision of law or regulations. However, compliance with the Order will be one factor considered in any decision whether to take enforcement action against the Respondents in the future. Failure to comply with this ORDER and ASSESSMENT will result in additional penalties.

Issued by the Commissioner of the Tennessee Department of Environment and Conservation on this 13th day of May 2008.


James H. Fyke, Commissioner
Tennessee Department of Environment and Conservation

NOTICE OF RIGHTS

Tennessee Code Annotated §§ 69-3-109 and 69-3-115 allow any Respondent named herein to secure review of this Order and Assessment. In order to secure review of this Order and Assessment, the Respondent must file with the attorney at the address below a written petition setting forth each of the Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondent must file the written petition within thirty days of receiving this Order and Assessment. If the required written petition is not filed within thirty days of receipt of this Order and Assessment, this Order and Assessment will become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the Order and Assessment will not be subject to review pursuant to T. C. A. §§ 69-3-109 and 69-3-115. Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T. C. A. §4-5-301 *et seq* of the *Uniform Administrative Procedures Act*, and the Department of State's *Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies*.

The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses on its behalf to testify. If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low-income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization. At the conclusion of a hearing the Board has the authority to affirm, modify, or revoke the Commissioner's Order. This includes the authority to modify the penalty within the statutory confines of up to \$10,000.00 per day for each day of violation.

Payment of the civil penalty or appeal of this Order should be sent to the following address: Devin M. Wells, Assistant General Counsel, Tennessee Department of Environment and Conservation, L & C Tower 20th Floor, 401 Church Street, Nashville, TN 37243. Make check payable to "Treasurer, State of Tennessee" and write case number on check for record keeping purposes.

All other correspondence required under this Order should be sent to the following: Division of Water Pollution Control—Enforcement and Compliance Section, Tennessee Department of Environment and Conservation, 6th Floor L & C Annex, 401 Church Street, Nashville, TN 37243.



Devin M. Wells
Assistant General Counsel
BPR # 021059